



IN THE HIGH COURT OF SOUTH AFRICA /ES  
(GAUTENG DIVISION, PRETORIA)

|   |                  |
|---|------------------|
| DELETE WHICHEVER IS NOT APPLICABLE        |                  |
| (1) REPORTABLE: YES / NO                  |                  |
| (2) OF INTEREST TO OTHER JUDGES: YES / NO |                  |
| (3) REVISED                               |                  |
| <u>DATE</u>                               | <u>SIGNATURE</u> |

CASE NO: A466/2013

DATE: 8/5/2015

IN THE MATTER BETWEEN

POPI IRENE SHONGWE

APPELLANT

AND

ROAD ACCIDENT FUND

RESPONDENT

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JUDGMENT

PRINSLOO, J

[1] This is an appeal flowing from a typical action for damages arising from personal injuries sustained in a motor collision, and the claim was launched in terms of the provisions of the Road Accident Fund Act, Act no 56 of 1996 ("the Act").

[2] The appellant is a 50 year old female teacher.

On 3 October 2005 she was involved in a motor collision and seriously injured.

[3] The main injury sustained was a compression fracture of the T8 thoracic vertebra with 40% height loss over the anterior aspect. She also sustained contusions, abrasions and lacerations and there was a head injury with loss of consciousness. The injuries were accompanied by shock and psychological trauma.

[4] In a medico-legal report dated July 2010, the occupational therapist, Ms Jacobs, describes the condition of the plaintiff as follows, with particular reference to her ability to compete on the open labour market:

"Considering the assessment results, it is clear that the client is currently coping with her job, however with pain and discomfort, especially with regard to the prolonged standing requirements, as she is required to stand for a full 50 minute period for up to 6 periods a day. It is recommended that the client be allowed to sit while teaching as this will greatly improve her pain levels and subsequent feelings of fatigue. In addition the client will benefit from a bag on wheels in order to carry her required stationery and books between classes. Given the implementation of this and all the other suggested recommendations in this and other reports, the client will most probably experience less pain and discomfort.

The assessor is of the opinion that the client will be able to continue her occupation as a teacher. However, the accident in question has had a negative effect on her function due to pain and discomfort over her thoracic spine. Should she seek alternative employment, she would be limited to work of a

sedentary to light classification and may find working in a physically demanding job challenging. However, given her career history and level of education, it is highly unlikely that Ms Shongwe will return to a physical demanding job. Additionally, she will continue to be reliant on a sympathetic employer and will remain a vulnerable employee."

[5] A specialist neurosurgeon, Prof Lekgwara, postulates that the plaintiff has a 20% to 30% chance of developing thoracic spine degenerative disease. In this event, she may require surgical treatment in the form of a thoracic discectomy and fusion with instrumentation.

[6] With regard to the appellant's earning capacity, an orthopaedic surgeon, Dr J J L Heymans, says the following in a medico-legal report dated July 2010:

"Invloed op werkvermoë: Die pasiënt is 'n onderwyseres. Na die ongeluk was sy vir drie maande met siekteverlof waarna sy haar werk hervat het. Volgens die pasiënt ervaar sy tans pyn en ongemak in haar rug wanneer sy haar werk verrig, veral wanneer sy lank staan en klas gee. Sy het ook 'n probleem met die sport afrigting wat sy tot en met die ongeluk gedoen het. Met die voorgestelde behandeling behoort die pasiënt se simptome tot so 'n mate te verbeter dat sy geskik behoort te wees om ligte werk te kan verrig. Die pasiënt is nie geskik om swaar voorwerpe te hanteer en vir lang periodes te staan nie. Indien sy met hierdie beperkinge in diens gehou kan word, behoort sy 'n normale arbeidsleuensspan te hê."

- [7] In a medico-legal report of August 2010, an industrial psychologist, Dr Henk Steyn, postulated that, but for the injuries, the appellant would have been promoted to the position of head of department at least ten years before retirement age of 65 years. With her present disabilities and curtailed capacity in the work place, such a promotion is no longer likely.
- [8] Against this background, the actuary, Dr Robert Koch, was instructed to calculate the estimated future loss of earnings or loss of earning capacity of the appellant. I will revert shortly to the contents of Dr Koch's actuarial report.

Procedural history of this case

- [9] The collision occurred on 3 October 2005.
- [10] The action was instituted in June 2008.
- [11] On 15 June 2012, the defendant's defence was struck out by this court during interlocutory proceedings, for lack of compliance with the rules by the defendant.
- [12] On 22 August 2012 the trial came before this court. The defendant was in default, but the defendant's counsel announced his appearance and applied for a postponement which was refused.

The trial proceeded on the question of *quantum*. The negligence issue fell by the way side, when the defence was struck out. Counsel for the defendant was also allowed to take part in the proceedings and to cross-examine the appellant when she gave

evidence as plaintiff. The learned Judge summarised part of the appellant's evidence as follows:

"After seven years she still experiences pain in her spinal cord, and it is getting worse. She is unable to walk or stand for lengthy periods of time, neither can she sit for long. She is now 48 years of age. She is employed as a teacher and is experiencing trouble performing her duties. As a result of the injury to her back she is not anymore able to coach sport at school. She also experiences problems having sexual intercourse with her husband, resulting in marital problems. During cross-examination by Mr Monyane she stated that she has not heard of any complaints from her employer."

- [13] In his judgment, the learned Judge analysed the medico-legal evidence, and the evidence of the plaintiff, and found that no case had been made out for compensation for loss of future earnings or loss of earning capacity. The learned Judge made the following award:

|   |             |
|---|-------------|
| Past medical expenses   | R 16 849,05 |
| General damages   | R300 000,00 |
| An undertaking in terms of section 17(4)(a) of the Act<br>in respect of future medical and related expenses |             |
| Costs   |             |

The monetary award therefore came to R316 849,05.

- [14] An application for leave to appeal was dismissed by this court, but granted by the Supreme Court of Appeal, on petition, on 6 March 2013. The costs order of the court *a quo* in dismissing the application for leave to appeal was set aside and it was

declared that the costs of the application for leave to appeal in the Supreme Court of Appeal and in the court *a quo* are costs in the appeal.

The leave to appeal was limited to that part of the judgment of this court dismissing the appellant's claim for loss of earnings and earning capacity.

[15] On this narrow issue, the appeal came before us. Mr Nel appeared for the appellant. There was, not surprisingly, no appearance for the respondent.

[16] Returning to the actuarial report of Dr Koch, he based his calculations and assumptions on the medico-legal evidence and, particularly, on the postulation by the industrial psychologist that the appellant would have been promoted to head of department at age 55 (pre-morbid) but, as a result of the injury sustained, this promotion would no longer take place.

The future income calculated pre-morbid came to R4 519 351,00 and in the injured scenario to R3 272 594,00.

We debated with counsel what a realistic deduction in respect of general contingencies would be. We came to the conclusion that a 20% deduction in respect of the pre-morbid earnings and a 10% deduction in respect of the post-morbid earnings would be appropriate. This translates to an award of R670 146,00 in respect of future loss of earnings or loss of earning capacity.

[17] In the result, the appeal falls to be upheld and the award made by the learned Judge set aside and replaced with the higher award which will include the amount calculated in respect of the loss of future earnings or loss of earning capacity.

[18] The order of this court of 4 September 2012, in paragraphs 2 and 3 thereof, already makes provision for the furnishing of the undertaking in terms of section 17(4)(a) of the Act and for payment of the appellant's taxed or agreed party and party costs including the costs of senior counsel and the preparation and reservation fees, if any, of the relevant medical experts and the actuary.

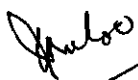
Consequently, it is only paragraph 1 of the order of the court *a quo* providing for the award of R316 849,05, which falls to be set aside and replaced with the higher award of R986 995,00.

#### The order

[19] I make the following order:

1. The appeal is upheld with costs.
2. Paragraph 1 of the order of this court of 4 September 2012 is set aside and replaced with the following:

"The defendant is ordered to pay the plaintiff the sum of R986 995,00 directly into the trust account of the plaintiff's attorney, G P Venter Attorneys, Standard Bank, Hatfield branch, (Branch code: 011545), account no: 012543519 together with interest thereon at the rate of 15,5% per annum alternatively 9% per annum, calculated from 14 days after this award to date of payment."



W R C PRINSLOO  
JUDGE OF THE GAUTENG DIVISION, PRETORIA

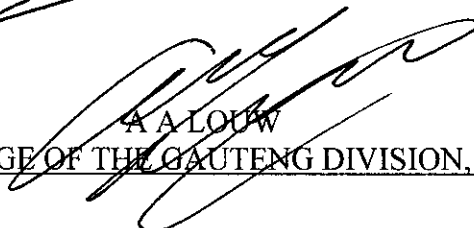
A466/2013

I agree



N M MAVENDLA  
JUDGE OF THE GAUTENG DIVISION, PRETORIA

I agree



A A LOUW  
JUDGE OF THE GAUTENG DIVISION, PRETORIA

HEARD ON: 25 FEBRUARY 2015  
FOR THE APPELLANT: P NEL  
INSTRUCTED BY: G P VENTER ATTORNEYS  
FOR THE RESPONDENT: NO APPEARANCE